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# CORPORATIONS

by

Margaret Amsler\*

THE Sixtieth Texas Legislature met in regular session in 1967 and enacted a substantial amount of legislation in the corporate field. Much of this legislation was drafted by the Committee on Corporate Law of the Texas State Bar Section on Corporation, Banking and Business Law.

The legislation drafted by the Committee consisted of three bills: Senate Bill 132, containing amendments to the Texas Business Corporation Act; Senate Bill 131, making some changes in the Texas Non-Profit Corporation Act; and Senate Bill 133, which repealed prior legislation codified as Article 1524.<sup>1</sup> All three bills became effective on June 17, 1967.<sup>2</sup>

## I. AMENDMENTS TO THE TEXAS BUSINESS CORPORATION ACT

*Treatment of Surplus in Reorganization.* Generally, under the TBCA, cash dividends can be paid "only out of the unreserved and unrestricted earned surplus of the corporation."<sup>3</sup> Nevertheless, in case of mergers, consolidations, and acquisitions, an earned surplus of the issuing corporation frequently must be capitalized to accomplish the reorganization. Since one or both of the corporations involved might have an earned or capital surplus, it would be helpful if the successor or resulting corporation could allocate either or both of these surpluses to its own earned surplus. Such an allocation would allow the reorganization to be accomplished while not depriving shareholders of the acquiring corporation of their expectation of dividends.

In case of mergers and consolidations, the "net surplus of the merging or consolidating corporations which was available for the payment of dividends immediately prior to such merger or consolidation, to the extent that such surplus is not transferred to stated capital or capital surplus by the issuance of shares or otherwise, shall continue to be available for the payment of dividends by such surviving or new corporation."<sup>4</sup>

Previously, the TBCA did not expressly authorize the same treatment for surpluses in acquisitions as was authorized in mergers and consolidations. The 1967 amendment to the definition of "earned surplus" in the Act now helps to put acquisitions on the same footing as mergers and consolidations by providing that, "Earned surplus shall include also any portion of surplus allocated to earned surplus in mergers, consolidations or acquisitions of all or substantially all of the outstanding shares or of the property and assets of another corporation, domestic or foreign."<sup>5</sup>

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<sup>1</sup> Tex. Laws 1967, ch. 656, at 1716-17; *id.* ch. 657, at 1717-29; *id.* ch. 658, at 1730-32.

<sup>2</sup> *Id.* ch. 656, at 1717; *id.* ch. 657, at 1729; *id.* ch. 658, at 1732.

<sup>3</sup> TEX. BUS. CORP. ACT ANN. art. 2.38A(1) (1956).

<sup>4</sup> *Id.* art. 5.06(7).

<sup>5</sup> *Id.* art. 1.02A(13), as amended, Tex. Laws 1967, ch. 657, § 1, at 1718.

The express authority, with the limitations thereon, to allocate a capital surplus to an earned surplus in case of mergers, consolidations, or acquisitions is found in a new section D added to article 2.17, TBCA.<sup>6</sup>

*Vote in Mergers, Consolidations, and Sales of Assets.* Articles 5.03, 5.07, and 5.10 of the TBCA were amended to provide that the majority vote required in cases of mergers, consolidations, and sales of assets will be two-thirds instead of four-fifths.<sup>7</sup>

*Dissolution.* The former requirement of a four-fifths vote for a voluntary dissolution by corporate action has been changed to a two-thirds vote.<sup>8</sup> Correspondingly, voluntary dissolution proceedings instituted can be revoked by a two-thirds vote.<sup>9</sup> The contents of the articles of dissolution, formerly contained in article 6.11, are now found in article 6.06.<sup>10</sup> Procedure for the filing of the articles of dissolution is now outlined in article 6.07.<sup>11</sup>

Previously, the statutory procedure for dissolution involved, first, the consent or vote to dissolve; then the filing of the declaration of intent to dissolve; followed by liquidation proceedings; and concluded by the filing of articles of dissolution. The problem with that procedure was that lawyers refused to follow it. They persistently forwarded to the Secretary of State their declaration of intent and their articles of dissolution in one packet, obviously eliminating any interim period for the liquidation. Because this practice left so many loose ends, the Committee included in the 1961 Texas Miscellaneous Corporation Laws Act an article to allow the corporate existence to extend for the period of time reasonably necessary for liquidation<sup>12</sup> and Part VI of the TBCA has been amended to eliminate the requirement for a declaration of intent to dissolve.

Former article 6.04 has been repealed; in its place is a new article 6.04 which contains substantially the liquidation provisions formerly included in article 6.06.<sup>13</sup> Liquidation should now take place "before filing articles of dissolution"<sup>14</sup> instead of "after filing of statement of intent to dissolve."<sup>15</sup> An added requirement is that the corporation, after voting to dissolve, shall cease to carry on its business, except insofar as may be necessary for the winding up thereof.

Former article 6.05, "Effect of Statement of Intent to Dissolve," has been repealed and a new article 6.05 substituted.<sup>16</sup> The new article con-

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<sup>6</sup> Tex. Laws 1967, ch. 657, § 4A, at 1719.

<sup>7</sup> *Id.* ch. 657, §§ 9, 10, 11, at 1720.

<sup>8</sup> TEX. BUS. CORP. ACT ANN. art. 6.03, *as amended*, Tex. Laws 1967, ch. 657, § 14, at 1724-25.

<sup>9</sup> TEX. BUS. CORP. ACT ANN. art. 6.15, *as amended*, Tex. Laws 1967, ch. 657, § 14, at 1725-26.

<sup>10</sup> Tex. Laws 1967, ch. 657, § 14, at 1726.

<sup>11</sup> *Id.* ch. 657, § 14, at 1727. Articles 6.08-6.12 were repealed. *Id.*

<sup>12</sup> See Texas Miscellaneous Corporation Laws, codified as TEX. REV. CIV. STAT. ANN. art. 1302-6.07 (1962).

<sup>13</sup> Tex. Laws 1967, ch. 657, § 14, at 1725.

<sup>14</sup> *Id.*

<sup>15</sup> TEX. BUS. CORP. ACT ANN. art. 6.06 (1956).

<sup>16</sup> Tex. Laws 1967, ch. 657, § 14, at 1725.

tains the procedure for revoking the voluntary dissolution proceedings, whether such proceedings were undertaken with unanimous written consent or by corporate action. Since the Secretary of State need not be advised that voluntary dissolution proceedings have been instituted, he need not be notified that they have been revoked, and no filing of the revocation is now required.

In 1959 the Texas Legislature transferred the collection and administration of franchise taxes from the office of the Secretary of State to that of the Comptroller of Public Accounts.<sup>17</sup> As a consequence, upon the voluntary dissolution of a corporation, the Secretary of State could not refer to his own records to determine whether franchise taxes were current. To supply him with this required information, articles 6.01 and 6.07 have been amended to provide that articles of dissolution must be accompanied with a certificate from the Comptroller that all franchise taxes have been paid.<sup>18</sup>

*Amendment of Articles of Incorporation.* It is frequently the experience of incorporators that, after articles of incorporation have been filed and before any shares have been issued or subscribed for and before any business has commenced, a need to amend the articles is discovered. To allow such an amendment by incorporators, a new section C has been added to article 4.02, TBCA, which provides: "The articles of incorporation may also be amended by the unanimous written consent of the incorporators of a corporation which has not commenced business and which has not issued any shares or accepted any subscriptions."<sup>19</sup>

*Dissenting Shareholders.* The practitioner trying to keep up with the time schedule for certain actions to be taken in connection with the procedure required for fixing the rights of a dissenting shareholder as established in article 5.12 often met himself coming back. He sometimes found that the statute required the corporation to accept or reject a dissenting shareholder's valuation before it had even received such valuation. The amendments to sections A and B of article 5.12, TBCA, provide a new and more orderly time schedule in which the various actions by the dissenting shareholders and by the corporation are to be taken.<sup>20</sup>

Under article 5.12C, the court was authorized to appoint "a qualified appraiser." Because the ends of justice occasionally require that there be more than one appraiser, this section has been amended to authorize the court to appoint "one or more qualified appraisers."<sup>21</sup> Under statutes of other states, the number of appraisers varies from "one or more" to "three."<sup>22</sup>

<sup>17</sup> See TEX. REV. CIV. STAT. ANN. arts. 7084, 7084b(1) (1960).

<sup>18</sup> Tex. Laws 1967, ch. 657, § 14, at 1724, 1727.

<sup>19</sup> *Id.* ch. 657, § 7, at 1719.

<sup>20</sup> *Id.* ch. 657, §§ 12A, 12B, at 1721-22.

<sup>21</sup> *Id.* ch. 657, § 12C, at 1722.

<sup>22</sup> See 2 MODEL BUS. CORP. ACT ANN. § 74, § 2.02(5) (1960) for reference to the various state statutes. In Delaware, Kentucky, Rhode Island, Washington and Puerto Rico the court appoints one appraiser. In California, Connecticut, Hawaii, New York and Virginia the court has the option to appoint one or more appraisers. In Georgia, Idaho, Massachusetts, Minnesota, Nevada,

In 1963 the Texas Supreme Court held in *Farnsworth v. Massey*<sup>23</sup> that where the statutory appraisal procedure had not been followed, a dissenting shareholder had the right to have a jury determine the fair value of his shares. This opinion created a spirited debate as to whether or not the appraisal procedure provided in article 5.12 was or was not the exclusive remedy for the dissenting shareholder.

In a few states, appraisal is the shareholder's exclusive remedy.<sup>24</sup> In other states, where the statutes contain no express exclusion of other remedies, the courts have held that statutory appraisal is the exclusive remedy in the absence of fraud.<sup>25</sup> Statutes in other states allow a dissenter to challenge the validity of the reorganization for fraud or irregularity, after which he may or may not have a right to follow a statutory appraisal remedy.<sup>26</sup>

In *Farnsworth* there was apparently only one dissenting shareholder. If there had been two or more shareholders, each with the election to have his shares valued by an appraiser or by a jury, and each with an option either to join with other shareholders in an appraisal proceeding or to bring a separate suit, complications and confusion would arise. The purpose of article 5.12 is to provide "for one forum where all claims for appraisal may be consolidated, regardless of claimants' places of residence, thus eliminating a multiplicity of action in various courts which is harmful to corporation and shareholders alike."<sup>27</sup> In revising the article to further this purpose the Committee was of the opinion that when a dissenting shareholder seeks to recover only the fair value of his shares (even though he might label his remedy a suit for damages), then, in the absence of fraud, appraisal proceedings should be the exclusive remedy. The Committee did not believe that any statutory limitation or penalty should be placed on the right to challenge the validity or regularity of the procedure by which the corporate reorganization was accomplished. Section G has been added to article 5.12 with provisions designed to achieve these results.<sup>28</sup>

*Rights of Dissenting Shareholders.* Under article 5.13A of the 1955 version of TBCA, a shareholder who began the dissent procedure continued to "have all the rights and privileges incident to" his shares until payment was made or tendered. Foremost among these advantages was the right to vote his shares. When a shareholder in Company A dissented from the merger of Company A with Company B, his right to vote was theoretical rather than practical. After the merger was accomplished, he held a certificate for

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New Hampshire, South Dakota, and Vermont three appraisers are appointed, one by the shareholders, one by the corporation and the third by the first two. In Alabama, Arkansas, Florida, Kansas, Maryland, Michigan, Montana, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, and South Carolina the court appoints three appraisers.

<sup>23</sup> 365 S.W.2d 1 (Tex. 1963).

<sup>24</sup> See 2 MODEL BUS. CORP. ACT ANN. § 74, § 2.02(2) (1960) for reference to the statutes in Michigan, Pennsylvania and Wisconsin.

<sup>25</sup> See *id.* § 74, § 3.02 for reference to court decisions in various jurisdictions.

<sup>26</sup> *Id.* § 74, § 2.02. Compare Comment of Bar Committee on TEX. REV. CIV. STAT. ANN. art. 5.14 (1956) (now art. 5.15 (1967)).

<sup>27</sup> 2 MODEL BUS. CORP. ACT ANN. § 74, § 4 (1960).

<sup>28</sup> Tex. Laws 1967, ch. 657, § 12, at 1723.

shares in Company A, which has ceased to exist, and his dissent proclaimed that he opposed becoming a shareholder in the survivor, Company B. If the effect of article 5.13A was to make him a quasi-shareholder in Company B, then he had a right to vote in a corporation with which he had declared he wanted nothing to do.

The dissenting shareholder was entitled to any cash dividends in the interim, *but* the dividends were applied as a credit on payment for his shares.<sup>29</sup> If the dividend was a stock dividend he would receive no additional value, since his shares were valued as of the day before the vote was taken authorizing the corporate action.<sup>30</sup> Consequently, the right to dividends, too, was an empty one.

The statutory continuation of "rights and privileges" was not really effective and could be troublesome. Other states have taken a more realistic attitude towards the status of a shareholder after dissent and before payment. In seventeen states, after such shareholder has demanded payment, his only right is the right to receive payment.<sup>31</sup> In three states, after the effective date of the merger, his only right is to receive payment.<sup>32</sup>

The 1967 amendments delete sections A and B of article 5.13 and substitute new language. Under the new section A, the only rights of a dissenting shareholder, after his demand for payment, are his right to receive payment and his right to maintain any appropriate action to obtain relief for fraud in the reorganization action. It is expressly provided that voting rights no longer exist.<sup>33</sup>

Another problem under the old provision involved sale of shares held by a dissenting shareholder. After demand, the dissenting shareholder still held his certificate which could be transferred to a good faith purchaser for value without notice of the dissent. Since the shares were disenfranchised, the purchaser had no right to vote and he would be disappointed and the corporation embarrassed. To avoid this contingency, a new article 5.13B was enacted.<sup>34</sup> Under this section a dissenting shareholder is required to submit his certificate to the corporation for a notation thereon that a demand for payment has been made. If the shareholder does not submit the certificate, the corporation is given the right to terminate his right to payment. A court of competent jurisdiction, for good and sufficient cause, is authorized to restore the right to payment. A purchaser who buys a certificate with a notation of dissent thereon has not bought shares; he only takes an assignment of the dissenting shareholder's rights.

The position of the dissenting shareholder after demand for payment is not frozen. Under a new article 5.13C, he may withdraw his demand for payment (1) before payment, (2) before the petition for appraisal is filed, or (3) after such petition is filed, if the corporation consents. Under

<sup>29</sup> TEX. BUS. CORP. ACT ANN. art. 5.13B (1956).

<sup>30</sup> *Id.* art. 5.12A(1).

<sup>31</sup> See 2 MODEL BUS. CORP. ACT ANN. § 74, § 2.02(8) (1960) for reference to the statutes in Arkansas, Connecticut, Delaware, Florida, Georgia, Kansas, Maryland, Michigan, Mississippi, Nevada, New York, Ohio, South Carolina, Tennessee, Virginia, Washington and Puerto Rico.

<sup>32</sup> See note 31 *supra* for reference to the statutes in Hawaii, Indiana, and Pennsylvania.

<sup>33</sup> TEX. LAWS 1967, ch. 657, § 13, at 1723.

<sup>34</sup> *Id.*

this section, the right to payment may be terminated if the shareholder fails to send in his certificate for notation of his demand, if no petition to determine the value of his shares is filed within the prescribed time, or if the court should find that he is not entitled to payment. In the event the demand is withdrawn or the right to payment terminated, the shareholder occupies the same shareholder status he would have occupied had he voted for the reorganization, except that he has no right to prejudice any corporate proceedings which may have been taken in the interim. If dividends were paid or other distribution made to shareholders in the interim, he shall be entitled to receive his share.<sup>35</sup>

Section D of the original article 5.13 has been deleted. Under that section, it was possible for a corporation to terminate the shareholder's right to payment by an abandonment or a rescission of the reorganization proceedings. This deletion prevents a corporation from depriving a shareholder of his right to payment by unilateral action. If a corporation abandons the reorganization or votes to rescind, the dissenting shareholder now has the election to pursue his right to payment or to return to his status as shareholder. If he were denied the right to return to such status, this denial might constitute very strong evidence to support his cause of action against the corporation for fraud.

*Registered Agent.* Frequently registered agents of corporations serve as such for many corporations. Under old article 2.10, TBCA, if these agents changed their addresses, even though within the same city, this change could be accomplished only with action by the board of directors of each of the corporate clients represented, followed by the filing of the change with the Secretary of State. If such change of address would affect the venue of suits brought against the corporation, the need for corporate approval is apparent. However, if the change is from one place in the county to another place in the same county, the need for such corporate action does not arise. Yet to accomplish the change under the old requirements involved time, effort, and expense and constituted an unnecessary burden. To lift this burden, article 2.10.1 was added which permits an agent to effect a change of address within a county by giving ten days notice thereof to the corporations involved followed by the filing of a statement of change of address with the Secretary of State.<sup>36</sup>

*Action Without Meetings.* The increased tempo of modern living has affected corporations. It frequently is to the corporation's interest to have an immediate decision on a matter of policy at a time when it is not possible to have a meeting of the board of directors. In such cases, the corporation could act if the directors were able to dispense with the necessity of a meeting and consent in writing to the desired action. A new section B has been added to article 9.10 to provide that unanimous written consent of

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* ch. 657, § 4, at 1718-19. The new section D added to article 8.09 allows the registered agent of a foreign corporation the same opportunity to resign as is allowed the agent of a domestic corporation under article 2.10D. *Id.* ch. 657, § 16, at 1727-30.

directors or of members of an executive committee may be substituted for a meeting. If a corporation does not want its directors to be so empowered, the corporation may restrict this statutory authority in its articles of incorporation or by-laws.<sup>37</sup>

## II. AMENDMENTS TO THE TEXAS NON-PROFIT CORPORATION ACT<sup>38</sup>

Prior to the adoption of the Texas Non-Profit Corporation Act in 1959, statutes governing such corporations were sketchy or non-existent in the areas dealing with meetings of boards of trustees or directors. Such rules as there were for these organizations were found in their "charters" or in their "constitution-and-by-laws," and were rules based on a common agreement or understanding. Meetings were informal and casual. Under the 1959 Act, such meetings became matters controlled by statute, and many non-profit corporations frequently found themselves unable to function because of the inability to comply with the statutory requirements. Many such corporations prefer large boards of directors, but do not anticipate that all or even most of the directors named will participate in the management of the affairs of the corporation. Even when a majority of the board could be assembled, sometimes a particular action could not be taken in the absence of unanimity because of a statutory requirement that such action be taken by the vote of a majority of the number of directors. The difficulty in rounding up a quorum and in meeting the statutory voting requirements presented very real problems to many non-profit corporations.

Senate Bill 131, effective June 17, 1967, amends article 2.17 of the Texas Non-Profit Corporation Act to allow a corporation to fix its own quorum of directors, in its articles or its by-laws, so long as the quorum is not less than three. To assist in securing those "majority of the number of directors" votes, the corporation may also provide for proxy voting of directors, but proxies may not be counted to make a quorum. Directors' proxies are limited in duration to three months and are revocable unless they are expressly made irrevocable, and unless otherwise made irrevocable by law.

Another problem area for non-profit corporations was that of vesting non-directors with a power of management. There were many non-profit corporations whose boards did not include persons who were experienced in certain business and professional fields where the organization might need expert management and advice. To enable the non-profit corporation to secure the necessary "outside" assistance, article 2.18 of the Non-Profit Corporation Act dealing with committees of directors was amended to allow a minority of committee members to be non-directors. These mixed committees must be authorized by the articles or by-laws and by the vote of a majority of directors *in office*. Note that the vote required is not the majority of *the number* of directors.

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<sup>37</sup> *Id.* ch. 657, § 17, at 1728. This amendment is patterned after a similar provision in the GENERAL CORPORATION LAW OF DELAWARE art. 141(f) (1967).

<sup>38</sup> Tex. Laws 1967, ch. 656, at 1716-17.



Another area in which the existing statutes allowed no flexibility was that of the election of directors of a corporation which serves as an adjunct of another corporation and which has no members of its own. For example, a non-profit hospital might establish a non-profit clinic; a non-profit university might establish a non-profit art museum; or a church might establish a non-profit youth center. A new section E was added to article 2.15 which will allow the hospital, the university, or the church to elect the board of directors (in whole or in part) of the clinic, the art museum, or the youth center, where the articles of the latter so provide.<sup>39</sup>

### III. REPEAL OF ARTICLE 1524a<sup>40</sup>

In its work in connection with drafting the Texas Business Corporation Act, the Committee originally took the position that the loan companies governed by article 1524a constituted a "particular kind of corporation" over which the Committee had only limited jurisdiction. This attitude is reflected in section B of article 9.15, TBCA, which provides that:

[A]ny special limitations, obligations, liabilities and powers applicable to a particular kind of corporation for which special provision is made by the laws of this State, including . . . those corporations subject to supervision under Article 1524a of the Revised Civil Statutes of Texas, shall continue to be applicable to any such corporation, and this Act is not intended to repeal and does not repeal the statutory provision providing for these special limitations, obligations, liabilities, and powers.<sup>41</sup>

The "supervision" referred to is that of the Banking Commissioner.

Among the "one or more purposes" for which article 1524a companies could be incorporated were to accumulate and lend money, to deal in notes, bonds and securities, to act as trustee in an express trust or under court appointment, to act as agent, to buy and sell shares, bonds and other securities, to borrow money, and to issue debentures.<sup>42</sup> Drafters of purpose clauses for corporations incorporated under the TBCA frequently included one or more of these purposes. Then the client, operating a retail shoe store or a furniture manufacturing plant, would be notified by the Banking Commissioner that his business was now subject to the supervision of the Banking Commissioner. Following this notification, the client was apt to steam into his lawyer's office demanding to know why his business was any business of the Banking Commissioner. The embarrassed lawyer would have to advise his client that he would have to be so supervised or that the articles of incorporation would have to be amended to delete the mischief-making clause. Lawyers appealed to the Committee to take action to protect them from this embarrassment and the Committee undertook to secure the repeal of article 1524a, the continued existence of which was so great a nuisance to the ordinary business corporation.

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* ch. 658, at 1730-32.

<sup>41</sup> TEX. BUS. CORP. ACT ANN. art. 9.15 (1956).

<sup>42</sup> TEX. REV. CIV. STAT. ANN. arts. 1302, 1303b were repealed in 1961. The publishers have, for the benefit of the profession, preserved them in an Appendix to volume 3 of TEX. REV. CIV. STAT. ANN.

A second problem with this troublesome article motivated the legislature to attempt its repeal in 1963. The Texas Regulatory Loan Act<sup>43</sup> provided, in sections 29 and 30, that article 1524a would not apply to licenses under that Act and that article 1524a was repealed. However, the Texas Supreme Court, in *Allied Finance Co. v. Falkner*,<sup>44</sup> expressly approved the holding of the court of civil appeals that the provisions of these sections of that Bill did not conform to the caption and were, therefore, unconstitutional and void. As a result, article 1524a companies, even though licensed as lending companies under the 1963 Act and thus subject to the supervision of the Regulatory Loan Commissioner, were subject, as 1524a companies, to the supervision of the Banking Commissioner as well. The repeal of article 1524a consequently served the double purpose of avoiding the obviously unintended result of subjecting ordinary business corporations to the supervision of the Banking Commissioner and of accomplishing the purpose of the legislature in its enactment of section 30 of the Regulatory Loan Act.<sup>45</sup>

#### IV. OTHER LEGISLATION

*Voting Rights of a Class.* Under article 2.29, TBCA, recognition is given to the authority to limit or deny the voting rights of the shares of any class. This is limited by article 4.03A(7), which provides that the holders of the outstanding shares of a class shall be entitled to vote on a proposed amendment to the articles "whether or not entitled to vote thereon by the provisions of the articles of incorporation" when such amendment would create a new class of shares. Many corporations operating under the TBCA accomplish their financing by issuing new classes of preferred shares from time to time as the need arises. Either their articles do not contain a provision for the authorization of "blank shares" under article 2.13, or else such provisions would not fit their particular situation. These corporations have included in their articles and printed on their certificates a denial of the right of these shareholders to vote on a subsequent amendment to allow the issuance of a new series of shares. Under old article 4.03, these shareholders had the right to vote even in the face of this express provision. This statutory right made it difficult for such corporations to secure additional capital since the holders of outstanding shares would frequently oppose the issuance of new shares having rights equal or superior to those of the prior shares, or would demand, as the price of their vote, an amendment of the articles to up-grade their shares. New article

<sup>43</sup> Tex. Laws 1963, ch. 205, at 550, codified as TEX. REV. CIV. STAT. ANN. art. 6165b, repealed by Tex. Laws 1967, ch. 274, at 659.

<sup>44</sup> 397 S.W.2d 846 (Tex. 1965).

<sup>45</sup> The Committee found that the repeal was not as simple a matter as expected. Trust companies organized under TEX. REV. CIV. STAT. ANN. art. 1513a (1965) were, by the terms of that article, made subject to the supervisory provisions of TEX. REV. CIV. STAT. ANN. art. 1524a and these companies desired to continue to be subject to that supervision because of some income tax benefits available to them by reason of their banking relationship. Therefore, article 1513a was first amended to lift the supervisory provisions from article 1524a and incorporate them in article 1513a, and then article 1524a was, at long last, repealed. Tex. Laws 1967, ch. 658, §§ 1, 2, at 1730-32. This bill was passed by the legislature and approved by the Governor on June 17, 1967, on which date it became effective.

4.03C eliminates this problem, providing in effect that if the articles of incorporation deny the right to vote in such cases, the shareholders do not have the right to vote.<sup>46</sup>

*Usury.* A new article 2.09 has been added to the Texas Miscellaneous Corporation Laws Act.<sup>47</sup> The new provision prohibits a corporation from asserting a claim or defense of usury where it borrows \$5,000 or more in one loan or a series of connected loans and agrees to pay interest at a rate not to exceed one and one-half per cent per month. The terms of the new Consumer Credit Code<sup>48</sup> provide that loans of up to \$2,500 to a corporation may be made repayable in installments at a rate of ten per cent per annum plus an add-on interest charge not to exceed \$8 per \$100. Unanswered is the question whether corporate loans in excess of \$2,500 but less than \$5,000 are now subject to the ten per cent interest limitation.

*"Going Out of Business Sale."* Judging from the 1967 legislation, the legislature apparently believes that a business which advertises a "going out of business sale" should have the simple decency to go out of business. A new provision of the Texas Penal Code makes it unlawful for anyone "to fraudulently represent that he is going out of business."<sup>49</sup> To prevent such frauds, every person conducting such a sale is required to secure a permit, good for 120 days, with the privilege of renewal for another 120 days. In each case, a sworn and detailed inventory of the goods to be sold must be filed with the county or city tax assessor or collector, who is authorized to issue the permit. Under the Consumer Protection Code, the "advertising of a liquidation sale, auction sale or other sale fraudulently representing that the person is going out of business"<sup>50</sup> is unlawful. The Consumer Credit Commissioner is authorized, upon receiving a written complaint, to request the Attorney General to restrain such practices by securing a temporary or permanent injunction. A violation of the injunction carries with it a civil penalty of not more than \$1,000 per violation.<sup>51</sup> The penalty for violating the Penal Code provision is a fine of not less than \$200, with each separate day's violation constituting a separate offense.<sup>52</sup>

*Share Ownership—Right of Survivorship.* The legislature adopted an act in 1963 which permitted a corporation, with respect to shares owned jointly with a right of survivorship, to treat the survivor as the owner until it received written notice of a contrary claim. This legislation was codified in the Uniform Stock Transfer Act<sup>53</sup> and was inadvertently repealed by the Uniform Commercial Code in 1965. It was re-enacted by the Sixtieth Legislature.<sup>54</sup>

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<sup>46</sup> Tex. Laws 1967, ch. 663, § 1, at 1758.

<sup>47</sup> *Id.* ch. 296, at 713.

<sup>48</sup> *Id.* ch. 274, at 608. See art. 4.01, *id.* at 627.

<sup>49</sup> *Id.* ch. 434, § 2, at 1004.

<sup>50</sup> *Id.* ch. 10, at 658.

<sup>51</sup> *Id.* at 659.

<sup>52</sup> *Id.* ch. 434, § 2, at 1004.

<sup>53</sup> TEX. REV. CIV. STAT. ANN. art. 1302-6.04 (1962).

<sup>54</sup> Tex. Laws 1967, ch. 188, § 1, at 423, to be codified as TEX. REV. CIV. STAT. ANN. art. 1358b (1967).

*Taxation.* Several of the 1967 acts provided for additional tax exemptions. Under one,<sup>55</sup> churches which engage in "the dissemination of information on a religious faith through radio, television, and similar media of communication" are accorded a tax exemption on the personal property, buildings and attached grounds necessary for accomplishing such activities. Another gives an exemption from the state property tax to non-profit corporations organized as societies for the prevention of cruelty to animals.<sup>56</sup> A third provides exemption to "the property of all fraternal organizations . . . so long as the property is owned and used for charitable, benevolent, religious, and educational purposes, and is not in whole or in part leased out to others, or otherwise used with a view to profit."<sup>57</sup> The exemption does not apply to property of fraternal organizations which pay any type of insurance benefits to their members nor to those which engage in any political activity in behalf of or opposed to a candidate for public office.

Although not a tax exemption, a tax benefit is provided in another area. All intangible personal property of any trust forming a part of a pension plan, disability or death benefit plan, profit sharing or stock bonus plan is to be valued for tax purposes by deducting from the total valuation of its assets the gross amount held for the satisfaction of liabilities to employees and their beneficiaries.<sup>58</sup>

*Workmen's Compensation.* Executive officers of a corporation may be covered by workmen's compensation insurance under an amendment of that act.<sup>59</sup> Officers can receive the benefits of such insurance if their corporation is a subscriber, and if the coverage is specifically included in the contract. However, in determining whether a corporation has three or more employees, the executive officer shall "under no circumstances" be counted as an employee.

## V. THE 1967 CASE LAW DEALING WITH CORPORATIONS

During the past year, corporate litigation in Texas continued in the pattern outlined in the first annual *Survey*. That is, "the majority of the corporate cases reported last year dealt with questions typical of the small corporation."<sup>60</sup> Again, the cases involved a great variety of issues. In an attempt to preserve the continuity of the annual *Survey*, the author of this report will follow, as nearly as may be, the functional categories established by Professor Pelletier.<sup>61</sup>

*The Fiduciary Duty of Officers and Directors.* The Dallas court of civil appeals in *Petroleum Anchor Equipment, Inc. v. Tyra*<sup>62</sup> was called upon

<sup>55</sup> Tex. Laws 1967, ch. 336, § 1, at 802, to be codified as TEX. REV. CIV. STAT. ANN. art. 7150-1 (a) (1967).

<sup>56</sup> Tex. Laws 1967, ch. 310, § 1, at 742, to be codified as TEX. REV. CIV. STAT. ANN. art. 7150-7 (1967).

<sup>57</sup> Tex. Laws 1967, ch. 105, § 1, at 319.

<sup>58</sup> *Id.* ch. 194, § 1, at 429, to be codified as TEX. REV. CIV. STAT. ANN. art. 7244a (1967).

<sup>59</sup> Tex. Laws 1967, ch. 192, § 1, at 426-27.

<sup>60</sup> Pelletier, *Corporations, Annual Survey of Texas Law*, 21 Sw. L.J. 134 (1967).

<sup>61</sup> *Id.*

<sup>62</sup> 410 S.W.2d 238 (Tex. Civ. App. 1966) error granted.

to decide whether a corporation had established its right to a cancellation of two assignments of applications for letters patent. The corporation contended that its president, without authority, had made a gratuitous transfer of a corporate asset. The defendants claimed that the corporation never really owned the asset since it was transferred to the corporation in order to place it beyond the reach of creditors of the transferor with the understanding that when the threat from such creditors subsided the patent rights would be returned to the debtor. The jury found, in favor of the defendant, that the original transfer to the corporation was not based on consideration. On remand from the supreme court, the court of civil appeals found evidence to support this jury finding and concluded that the original transfer to the corporation was invalid.

The corporation also alleged that the "resolution of the board" under which the president purported to act had never been presented to and adopted by the board. The meeting of the board relevant to the issue occurred on January 8, 1963. There was testimony that the president prepared the minutes of this meeting, which minutes included the resolution in dispute, and had the secretary sign them on February 15, 1963. The secretary testified that the first notice he had of the resolution reached him sometime in June of that year and that the board "rescinded" the resolution in July. The jury found that after January 8, 1963, the board of directors were "informed as to contents of" the corporate resolution and subsequently failed to act as ordinary prudent persons would have acted. The court of civil appeals thought that these findings would support an estoppel or a ratification of the unauthorized act. The reported evidence does not clearly indicate how soon after January 8 the board received notice; this would seem to be a material fact. The supreme court has granted writ of error.

In another case,<sup>63</sup> Brunswick Corporation sued in federal court for debt and to foreclose a mortgage on the bowling equipment of an incorporated bowling alley. The federal court enjoined the manager of the bowling lanes from continuing the operation thereof. Within a week after he ceased such operation the manager, as a shareholder of the corporation, petitioned in a Texas district court for a receiver for the corporation on the statutory ground that the corporate assets were being wasted and misapplied by the directors. His complaint alleged that the failure of the board of directors to reopen and operate the business would result in the wasting of corporate assets and an abandonment of the corporate purpose. The trial court appointed a receiver. The court of civil appeals held that the facts alleged were not inconsistent with the honest exercise of business judgment and would not support the charges of misapplication and waste, nor the other charges of illegality, oppression and fraud.<sup>64</sup>

The petitioner had also charged that the board was guilty of fraud against the corporation because the board had hired as attorney for the corporation a lawyer who also represented a competing corporation. The

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<sup>63</sup> *Texarkana College Bowl, Inc. v. Phillips*, 408 S.W.2d 537 (Tex. Civ. App. 1966).

<sup>64</sup> *Id.*

court pointed out that "within very narrow limits"<sup>65</sup> lawyers may represent clients having adverse interests, so that the petitioner's allegations were insufficient to establish a case of fraud. Another charge was that two of the directors had taken a conveyance of the corporate real property to themselves for the purpose of obtaining a loan for the corporation but that no loan had been obtained. It appears that this complaint is being litigated in still another court proceeding.<sup>66</sup> The appellate court pointed out that, under article 7.05, TBCA, the receivership sought by the petitioner could not be resorted to unless all other remedies were inadequate. Since, for all that appears, this other suit might afford relief, the court held that the receivership remedy was not available.<sup>67</sup> The trial court had granted the receivership without a hearing and the appellate court reversed and remanded.

It would seem to the casual reader that this corporation's principal trouble was that it did not have any money. The petitioner might have had better luck with his receivership had he predicated his claim on the fact that the corporation was insolvent or in imminent danger of insolvency.<sup>68</sup>

*Disregard of the Corporate Entity.* In the past year there seems to have been much less "piercing of the corporate veil" litigation than usual. There were two cases involving a creditor's attempt to hold an individual liable for a corporate debt; in neither was it necessary for the court to decide whether the facts were such as to require a disregard of the corporate entity to achieve justice. In one,<sup>69</sup> the plaintiff had originally filed suit against a corporate defendant which subsequently went bankrupt. The plaintiff then filed a claim as a creditor in the bankruptcy proceedings. Apparently, when the corporation was discharged in bankruptcy, the plaintiff's debt remained unpaid. The plaintiff then amended the original petition to allege that an individual defendant was jointly and severally liable with the corporation. The trial court sustained the individual defendant's plea that the plaintiff was bound by its election to proceed against the corporation, and the court of civil appeals affirmed the trial court's judgment.

In the second case,<sup>70</sup> a creditor sued a corporation and an individual. The latter pleaded that the debt sued on was a corporate, not an individual, obligation. The individual defendant had started his business as a proprietorship and had done business with the plaintiff in that capacity. The proprietorship was then incorporated without a change in name, unless the addition of "Inc." to the original name could be considered a change. In connection with the incorporation, the published notice requirement of

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<sup>65</sup> *Id.* at 540.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> TEX. BUS. CORP. ACT ANN. art. 7.05A(1)(a) (1956).

<sup>69</sup> *International Shoe Co. v. Marcus, Inc.*, 410 S.W.2d 235 (Tex. Civ. App. 1966) *error ref. n.r.e.*

<sup>70</sup> *American Smelting & Ref. Co. v. Ridgway*, 412 S.W.2d 675 (Tex. Civ. App. 1967) *error ref. n.r.e.*

the relevant statute was not met.<sup>71</sup> The court declared: "It is our view that Article 1302-2.02 means exactly what it says. It states in unmistakably clear language that 'Until such notice has been so published for the full period above-named, no change shall take place in the liability of such firm or the members thereof.'"<sup>72</sup>

Nor was the court impressed with the individual's claim that the plaintiff had actual notice of the change of ownership. The evidence by which defendant sought to establish actual notice to the plaintiff was that checks sent to the plaintiff by the proprietorship were drawn by "The Ridgway Co.—Special Account by W. O. Ridgway" whereas the checks sent by the corporation were drawn by "The Ridgway Co., Inc., by W. O. Ridgway." Said the court: "The checks did not convey actual knowledge or information to appellant of the incorporation of appellee, nor did they relieve appellee of the duty of publishing the statutory notice. Furthermore, it is our view that the mere receipt and deposit of the checks did not impose upon appellant the duty of making inquiry."<sup>73</sup>

Occasionally courts are called upon to determine whether shareholders have a right to demand that their existence and that of their corporation should be considered one existence for their particular purpose. In a condemnation case,<sup>74</sup> a corporation owned lot 12, adjoining both lot 13, owned by the three shareholders of the corporation, and lot 14, owned by two of these shareholders. Parts of lots 13 and 14 were condemned. The shareholders contended that their claim for damages for the taking should be for damages to the consolidated tracts as a whole under the unity-of-use doctrine. They planned to develop the three lots in the future for a single purpose, a shopping center. The court refused to ignore the separate corporate entity and held that there was not a unity of ownership necessary to support the unity-of-use doctrine. Said the court: "[A] corporation is an entity separate and apart from its stockholders and ownership of stock in a corporation having title to property is not the same as individual ownership by such stockholders."<sup>75</sup>

*Ultra Vires.* For the first time in Texas an appellate court had occasion to consider the statutory right of a shareholder to enjoin the performance of an ultra vires obligation of a corporation.<sup>76</sup> The plaintiff brought suit against the corporation for the unpaid balance of a note executed by the corporation. The corporation's defense was that the note was executed "without authority" since the note involved the assumption by the corporation of an individual debt owed by its president and that the note was void under article 1348<sup>77</sup> since it was without valid consideration. A share-

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<sup>71</sup> TEX. REV. CIV. STAT. ANN. art. 1302-2.02 (1965).

<sup>72</sup> *American Smelting & Ref. Co. v. Ridgway*, 412 S.W.2d 675, 677 (Tex. Civ. App. 1967) *error ref. n.r.e.*

<sup>73</sup> *Id.* at 678.

<sup>74</sup> *Gossett v. State*, 417 S.W.2d 730 (Tex. Civ. App. 1967) *error ref. n.r.e.*

<sup>75</sup> *Id.* at 735. See *California Zinc Co. v. United States*, 72 F. Supp. 591 (Ct. Cl. 1947). Unity of ownership was not such a prerequisite for a consolidation of enterprise in a condemnation case.

<sup>76</sup> *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578 (Tex. Civ. App. 1966) *error ref. n.r.e.*

<sup>77</sup> See TEX. REV. CIV. STAT. ANN. art. 1348 (1962).

holder sought to intervene and enjoin the corporation's payment of the note on the ground that the note was an ultra vires obligation. The trial court granted the plaintiff's motion for summary judgment against the corporation and dismissed the plea of intervention.

The note in question had been executed in the name of the corporation by its president, Shively, pursuant to a resolution of the corporation's board of directors. The resolution stipulated that the board "recognized" the debt to Moody and stated that this debt was one incurred in the financing of a stock purchase by the corporation.<sup>78</sup> The testimony summarized in the opinion might support the conclusions that there was in fact no consideration for the corporation's execution of the note, that the debt so "recognized" by the board was in fact the personal obligation of the president, and that it was the president who convinced the board that this was a corporate debt. The writer, like the court, finds the maze of corporate finance involved confusing, and wonders, unlike the court, how such evidence could support a summary judgment against the corporation.

The court found that the defensive pleading that the note was executed without authority was the equivalent of pleading that the note was ultra vires. Under article 2.04A this plea was not available to the corporation as the court concluded, but, under article 2.04B(1), an ultra vires undertaking of a corporation may be enjoined by a shareholder if the court should deem such remedy to be equitable. The court decided that the article was stated in broad enough language to authorize the shareholder to intervene in a suit brought against the corporation and that such shareholder was entitled to a hearing. Because the trial court had dismissed the plea of intervention without a hearing, the case was reversed and remanded.

In 1955 a member of the Committee speculated that in a case where the corporation itself could not rely on its own lack of power to defeat an obligation, "if the corporation can persuade one of its shareholders to take the initiative, which is not too difficult, it has at least a fair chance to have the ultra vires contract set aside and rendered harmless."<sup>79</sup> The evidence in this case indicates that there might have been some shopping around for a shareholder who was willing to intervene. The shopping around seems to have been done, however, not by the corporation, but by another shareholder who did not want to intervene himself. On remand, the court instructed the trier of facts to determine whether the intervening shareholder was the agent of the defendant corporation; if so, "then he would not be entitled to the relief sought."<sup>80</sup> Noting that the statutory right of the shareholder to enjoin is conditioned on the court's finding such remedy to be equitable, the court concluded that the shareholder might establish an equity to the extent that he could show that the corporation received no benefit from the note in question.

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<sup>78</sup> *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578, 583 (Tex. Civ. App. 1966) *error ref. n.r.e.*

<sup>79</sup> Trotti, *Should an Existing Corporation Adopt the Act?—Panel Discussion*, Proceedings, Texas Business Corporation Act Institute (1955), in 3A TEX. REV. CIV. STAT. ANN. 455 (1964).

<sup>80</sup> *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578, 590 (Tex. Civ. App. 1966) *error ref. n.r.e.*



If the corporation received no benefit from the note, then is not the note void as a "fictitious increase of indebtedness" under section 6 of article 12 of the Texas Constitution?<sup>81</sup> In other words, would not the fact that the corporation secured no benefit make its note "illegal" rather than "ultra vires"? In two cases where the corporation contended that its note was constitutionally void because the corporation had received no money, property, or labor, the supreme court found that the corporation had received the very "benefits" contracted for, so that there was no constitutional or statutory violation.<sup>82</sup> In the instant case the court found that "an inference can be drawn that appellant received no direct benefit, certainly at least from the note sued on."<sup>83</sup> Is not the defense of "no consideration" available to a corporate defendant against the payee? By what reasoning does this defense entitle a shareholder to enjoin payment? Is not the entire issue of "ultra vires" in the instant case irrelevant?

The court of civil appeals remanded "the whole case."<sup>84</sup> The supreme court refused the writ of error, no reversible error. Could the supreme court be taking the position that the remand was proper but that the reasons for the remand were unsatisfactory?

*Corporate Securities.* During the last year, there have been several occasions for appellate courts to construe pre-incorporation agreements relating to promises to take shares in and promises to issue shares of corporations to be formed. In one case,<sup>85</sup> suit was brought by a corporation against a subscriber for payment of his subscription. The defense was failure of consideration. The defendant alleged that he was induced to enter into the subscription agreement by the representations of the promoter that the corporation was to erect a downtown hotel, affording facilities for merchants and professional offices, to be operated by local personnel. He claimed that what the corporation did erect was an out-of-town motel, catering to the tourist trade, and operated by a nationwide motel chain. The trial court held that the variation between what the defendant had agreed to pay for and what was actually produced was so material as to relieve the defendant of liability. The appellate court found it difficult "to perceive either the theory on which the case was tried by the parties, or their position on appeal."<sup>86</sup> Despite this difficulty, the court concluded that the defendant had established a "subscription on special terms" for the violation of which the defendant was entitled to rescission and relief from liability.

In another series of cases the complaint was that a pre-incorporation agreement entitled the plaintiff to shares which the corporation had not is-

<sup>81</sup> TEX. CONST. art. XII, § 6 reads: "No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void." This constitutional prohibition was incorporated into TEX. REV. CIV. STAT. ANN. art. 1348 (1962), and is now codified as *id.* art. 1302-2.06 (1967).

<sup>82</sup> *Whitten v. Republic Nat'l Bank*, 397 S.W.2d 415 (Tex. 1965); *Richardson v. Bermuda Land & Livestock Co.*, 231 S.W. 337 (Tex. Comm'n App. 1921).

<sup>83</sup> *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578, 585 (Tex. Civ. App. 1966) *error ref. n.r.e.*

<sup>84</sup> *Id.* at 591.

<sup>85</sup> *Texas City Hotel Corp. v. Wilkenfeld*, 410 S.W.2d 860 (Tex. Civ. App. 1966).

<sup>86</sup> *Id.* at 861.

sued to him. In three of these cases, the plaintiff was to render services in connection with the launching of the enterprise in exchange for shares in the future corporation. In one of these,<sup>87</sup> the plaintiff alleged that he was supposed to receive one-third of the shares of a corporation to be formed in consideration for his supervision of the organization of the business and the repair and remodeling of the building which was to be bought. He alleged that he had performed but the other parties to the agreement refused to issue him the shares. He sued for money damages, joining the corporation as a defendant. The trial court severed the plaintiff's cause of action against the corporation from that against the incorporators and dismissed the action against the corporation. The appellate court confirmed this action, holding that where the suit was only for money damages for breach of the contract, the corporation was not a proper party defendant.

In the second case,<sup>88</sup> the plaintiff alleged that payment by the corporation of his real estate commission was to be, at his option, in cash or shares. The president of the corporation had written a letter to the plaintiff, in answer to plaintiff's inquiry, to advise him that a particular sale, the Matera contract, "would fall within the purview of your contract" with the corporation. This letter was introduced in evidence. The trial court, which gave it the weight of an "admission" of liability, rendered summary judgment for the plaintiff for "damages for the conversion of 26,462 1/2 shares" in the sum of \$52,925. There were pleadings and affidavits by the corporation that the Matera contract had not been performed and that the plaintiff was not the producing cause of the contract. The trial court held that the admission was conclusive and struck these corporate defenses. The appellate court found that the letter did not meet two of the five tests required for a "judicial admission" in that it was not written during the course of a judicial proceeding and it was not a "deliberate, clear and unequivocal admission" of defendant's liability.<sup>89</sup> The court accordingly reversed and remanded for a trial on the merits, instructing the trial court that the letter would constitute only a "quasi-admission," which could be rebutted.

In the third of these cases,<sup>90</sup> a lawyer sued for 61,292.45 shares in the defendant corporation or their value, amounting to \$796,801.85, which he claimed by reason of an oral agreement made in 1952. He alleged that, in exchange for his legal services and his expenses in connection with organizing, incorporating, financing, and constructing an integrated natural gas pipeline in the United States, he was to have been paid "by being the owner of shares of corporate stock in the enterprise" for which he would pay the same amount of cash as was paid by the promoters for "founders'

<sup>87</sup> *Peter v. 2117 Walker Corp.*, 417 S.W.2d 459 (Tex. Civ. App. 1967).

<sup>88</sup> *Texas Distillers, Inc. v. Howell*, 409 S.W.2d 888 (Tex. Civ. App. 1966) *error ref. n.r.e.*

<sup>89</sup> The other three tests are: (1) that the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony; (2) that the giving of conclusive effect to the declaration will be consistent with the public policy upon which the rule is based; and (3) that the statement is not also destructive of the opposing party's theory of recovery. The San Antonio court cited its own prior opinion establishing these tests, *United States Fid. & Guar. Co. v. Carr*, 242 S.W.2d 224 (Tex. Civ. App. 1951) *error ref.*, and the subsequent Texas Supreme Court opinion adopting these tests, *Griffin v. Superior Ins. Co.*, 161 Tex. 195, 338 S.W.2d 415 (1960).

<sup>90</sup> *Krueger v. Young*, 406 S.W.2d 751 (Tex. Civ. App. 1966) *error ref. n.r.e.*

stock." There was evidence that, in 1954, the plaintiff performed his last professional service and was paid in full for his services and expenses. The appellate court entertained some doubt about the accuracy of the plaintiff's memory. It pointed out that the defendant had shown that plaintiff's claim "has progressed from one by which he claimed the right to buy a few shares in June 1954, more shares in June 1958, to the right to buy 900 shares in December 1959, 7,359 shares in 1961 and 61,292.45 shares in 1965."<sup>91</sup> The trial court, after hearing the evidence, instructed a verdict for the defendants. The higher court found that this instruction was justified on at least two grounds: (1) the oral agreement was in violation of the statute of frauds since it was obvious that a promise to render such legal services in connection with the organization and construction of an integrated gas pipe line system was one which could not be performed in the space of one year from the making thereof, and (2) the plaintiff's remedy was barred by the statute of limitations.

The question in another case involving corporate securities<sup>92</sup> was whether, under the Uniform Stock Transfer Act, title to certain stock certificates had been so effectively transferred as to defeat a writ of garnishment. A judgment creditor had applied for a writ of garnishment on August 28, 1962, on the judgment debtor's bank. The bank answered that it held certain certificates in pledge for debts which the debtor owed the bank and that it had been presented with an assignment, dated the preceding January, by which the debtor had transferred all his interest in the shares to another person. The certificates, prior to the date of the assignment, had been in the possession of the bank, together with signed stock powers. The judgment creditor contended that there was no "delivery" sufficient to vest the title to the shares in the transferee. The higher court was of a different opinion, holding that:

[T]he circumstances of this case constitute 'delivery' of the certificates of stock within the meaning of the statute. We do not believe that manual handing of these certificates by Lee to Damrel was necessary in order to pass the title to the stock certificates. At the time the stock certificates were pledged by Lee to secure the indebtedness due the Bank such certificates were accompanied by stock powers. The written assignment from Lee to Damrel completed the transfer of the title to the stock certificates. There is nothing in the statute that requires the delivery of the stock certificates by the owner of the stock directly to the transferee.<sup>93</sup>

On motion for rehearing, the judgment creditor convinced the court that the date on which the assignment was handed to the bank does not appear in the record and that this fact was material in determining whether the assignment was handed to the bank before or after the service of the writ of garnishment. The court reversed and remanded the case for a determination of this date.

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<sup>91</sup> *Id.* at 757.

<sup>92</sup> *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Texas Nat'l Bank*, 411 S.W.2d 801 (Tex. Civ. App. 1966) *error ref. n.r.e.*

<sup>93</sup> *Id.* at 803. The statute referred to was TEX. REV. CIV. STAT. ANN. art. 1302-6.02 (1962). This article is now superseded by TEX. UNIFORM COMM. CODE art. 8-308 (1967).

*Shareholders' Rights.* In 1965, an amendment to article 12.17<sup>94</sup> provided a procedure for reviving the charters of corporations whose charters had been forfeited for failure to pay franchise taxes. In a suit brought in the name of the corporation under this article to revive a forfeited charter,<sup>95</sup> a shareholder intervened to protest that, as to him, the revival authorized by the 1965 Act was unconstitutional. The appellate court agreed that, upon the forfeiture of a corporate charter under the law applicable at the time this charter was forfeited, the shareholders' rights to their distributive share of assets became a vested property right, which could not constitutionally be impaired by the subsequent statute. The 1965 amendment to the franchise tax law does not contain a provision similar to the one in the 1961 Texas Miscellaneous Corporation Laws Act.<sup>96</sup> The 1961 Act authorized the continuation of a corporation whose period of duration had expired by an amendment of the articles and expressly provided that, "Such expiration shall not of itself create any vested right on the part of any shareholder, member, or creditor to prevent such action."<sup>97</sup> Under the law prior to 1961, the renewal of the charters of corporations whose terms had expired was authorized upon the vote of a majority of the outstanding shares.<sup>98</sup> It would seem that if a majority of the shares could continue the corporate existence, the minority shares did not have any vested property right to have the corporation expire when its period of duration expired.

A point involved in an action for declaratory judgment<sup>99</sup> was whether the owner of an undivided community half interest in shares had properly sought an inspection of the corporate books and records. In the course of the trial, the attorney of the owner asked the plaintiff-witness if he would permit the defendant to examine the corporate books for the purpose of determining the fair value of the shares involved, to which question the plaintiff answered "No." The trial court then refused the defendant's request that the court find that she was entitled to such an examination. On the appeal, the court of civil appeals felt that such a demand was not in compliance with the requirements of article 2.44, TBCA. Further, the appellate court pointed out, after a proper statutory demand and a refusal, the shareholder's remedy would be by mandamus.

Unexpected consequences sometimes follow the amendment of the draft of a complicated code by a legislative committee. The original draft of the TBCA provided for a two-thirds vote as the majority required in all those areas where more than a simple majority was required. The House committee, with reference to voluntary dissolution, merger, consolidation, and sale of assets, substituted their requirement of a four-fifths vote. No change was made in the two-thirds requirement for an amendment of articles (article 4.02, TBCA) nor in the two-thirds requirement for the issuance of treasury shares to officers or employees (article 2.22D, TBCA).

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<sup>94</sup> TEX. TAX.-GEN. ANN. art. 12.17 (1965).

<sup>95</sup> *Gano v. Filter-Aid Co.*, 414 S.W.2d 480 (Tex. Civ. App. 1967).

<sup>96</sup> TEX. REV. CIV. STAT. ANN. art. 1302-2.07D (1962).

<sup>97</sup> *Id.*

<sup>98</sup> Appendix to art. 1316a, 3 TEX. REV. CIV. STAT. ANN. 751 (1962).

<sup>99</sup> *Yelverton v. Brown*, 412 S.W.2d 325, 329-30 (Tex. Civ. App. 1967).

In a 1967 case,<sup>100</sup> involving a construction of article 2.22D, a protesting shareholder owned twenty-seven per cent of the outstanding preferred shares of each of two corporations and was, therefore, in a position to block a merger of the two. However, two-thirds of the other shares were voted in favor of the issuance of enough treasury shares to an employee of the corporations so that the protesting shareholder's percentage of ownership fell below twenty per cent. With the vote of the employee's shares, the other shareholders proceeded to merge. The appellate court held that such procedure was authorized and that the merger was valid.

Also involved in the case was the validity of a contract among the shareholders who were also the directors of the corporations. Under that agreement the parties had bound themselves "as shareholders and directors" not to borrow in excess of \$50,000 except by unanimous vote. The trial court held this contract void. The appellate court held that the agreement was valid in so far as it bound the parties as shareholders, but was invalid as it bound them as directors. At subsequent corporate meetings, extreme care will have to be taken in specifying whether the meeting is one of shareholders or of directors.

There were a number of Texas cases during the last year dealing with venue of an action against a corporate defendant,<sup>101</sup> with the matter of jurisdiction of Texas courts over a foreign corporation,<sup>102</sup> with taxation of corporations,<sup>103</sup> and with priority of creditors' claims in a corporate receivership.<sup>104</sup> Since the ultimate issues in these cases involve pleadings, proof, and issues not identified with corporation law, they are not examined.

In bringing this annual *Survey* to a close, the author finds herself in agreement with some of the more seasoned lawyers of her acquaintance. Frequently they wish that there was some way to compel the legislature and the courts to take a recess until the practitioner can catch up with the law he already knows.

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<sup>100</sup> *Burnett v. Word, Inc.*, 412 S.W.2d 792 (Tex. Civ. App. 1967).

<sup>101</sup> *Ideal Baking Co. v. Boyd*, 417 S.W.2d 613 (Tex. Civ. App. 1967); *Corpus Christi Hardware Co. v. Farrar*, 417 S.W.2d 479 (Tex. Civ. App. 1967); *Dina Pak Corp. v. May Aluminum, Inc.*, 417 S.W.2d 419 (Tex. Civ. App. 1967); *Rotex Mfg. Co. v. Little Dude Trailer Co.*, 416 S.W.2d 511 (Tex. Civ. App. 1967).

<sup>102</sup> *Crothers v. Midland Prods. Co.*, 410 S.W.2d 499 (Tex. Civ. App. 1967). See *VanDercreek, Texas Civil Procedure*, this *Survey*, at footnote 3.

<sup>103</sup> *Greyhound Lines, Inc. v. Board of Equalization*, 412 S.W.2d 76 (Tex. Civ. App.), *rev'd and rendered*, 419 S.W.2d 345 (1967).

<sup>104</sup> *Finger Contract Supply Co. v. Republic Nat'l Bank*, 412 S.W.2d 79 (Tex. Civ. App. 1967) *error ref. n.r.e.*